STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IDOLTHUS HUBBARD,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 263127
LC No. 04-010127-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALTON HUBBARD,

Defendant-Appellant.

No. 263361
LC No. 04-010127-01

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Codefendants and brothers Idolthus Hubbard (Idolthus) and Alton Hubbard (Alton) were jointly tried before two separate juries as a result of their alleged participation in a triple homicide. Idolthus's jury convicted him of three counts of first-degree premeditated murder, MCL 750.316(a), three counts of first-degree felony murder, MCL 750.316(b),[1] and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Alton's jury convicted him of one count of first-degree premeditated murder, MCL 750.316(a), two counts of second-degree murder, MCL 750.317, one count of felony-firearm, MCL 750.227b, and one count of possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Both codefendants were sentenced to life in prison without the possibility of parole, and both now appeal as of right. We affirm.

[1] The trial court subsequently vacated Idolthus's first-degree felony murder convictions.

I. Facts

On August 18, 2004, Annie Rivers, Jerome Edmonds, and Frank Olson were killed at 4139 Canton Street, a known drug house on Detroit's east side. Edmonds and Rivers were found inside the house, each dead from various gunshot wounds. Olson was found on the sidewalk in front of the house, near death with several gunshot wounds. Olson had apparently been shot inside, but had made his way to the front yard before collapsing. Olson died from his wounds shortly after being transported from the scene.

Alton and Idolthus were each charged with three counts of first-degree murder and various firearm-related offenses,[2] and were bound over for joint trial. Both codefendants timely moved for severance of their trials. Both codefendants also filed pretrial motions for suppression of their statements to the police. The trial court denied the motions for complete severance, but ordered the use of two separate juries.

After being arrested, Idolthus gave two separate statements to the police—one between 9:00 and 9:30 p.m. on August 23, 2004, and the other at about 1:15 a.m. on August 24, 2004. Alton gave one statement to the police following his arrest, at about 12:15 a.m. on August 24, 2004. A *Walker*[3] hearing was held with respect to both codefendants' custodial statements. The trial court concluded that all three statements were voluntarily, knowingly, and intelligently given. The court denied codefendants' motions to suppress.

At trial, Alton's jury and Idolthus's jury were selected from two separate venires. Opening statements concerning Alton Hubbard were given before Alton's jury only. Opening statements concerning Idolthus Hubbard were given before Idolthus's jury only.

Detroit Police Sergeant Ed Williams testified before Idolthus's jury concerning the details of Idolthus's statements to the police. In the first statement, Idolthus blamed Alton for shooting Edmonds and Olson, but did not account for the shooting of Rivers. He stated that Alton had used both a .38-caliber revolver and a 12-gauge shotgun. Idolthus admitted that he was at the scene and that he had possessed a .38-caliber revolver that was similar to the one possessed by Alton. However, Idolthus stated that he killed no one and that he only "shot at the wall." Idolthus stated that the homicides were robbery-related, and that Alton had wanted to rob the house at 4139 Canton Street in order to "get [the] bread." Idolthus suggested that Alton had killed Edmonds and Olson because he did not want to "leave [any] witnesses."

Williams then testified concerning Idolthus's second statement to the police, and read the statement before Idolthus's jury. In the second statement, Idolthus stated that he had not been

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[2] A third codefendant, Johnnie Jones (Jones), was charged with similar offenses and was tried by the court without a jury. Jones is the father of codefendants' sister's children, and is referred to by codefendants as their "brother-in-law." Jones was acquitted on all murder charges, but was convicted of one count of felonious assault, MCL 750.82, one count of felon-in-possession, MCL 750.224f, and one count of felony-firearm, MCL 750.227b. Jones is not a party to these consolidated appeals.

[3] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

completely truthful in his first statement. Idolthus stated that although Alton had shot Edmonds and Olson, he had shot the "lady" in "the kitchen."

Idolthus's jury was then excused and Alton's jury was brought into the courtroom. Detroit Police Sergeant Ernest Wilson testified regarding Alton's statement to the police, and read the statement before Alton's jury. In the statement, Alton admitted that he had shot Edmonds and Olson, but stated that Idolthus had shot Rivers. Alton also stated that Jones had been present at the scene, had possessed a gun, and had shot into a front bedroom. However, Alton indicated that Jones had not killed anyone.

Trial then proceeded before both juries. Several police witnesses testified that both codefendants had been advised of their constitutional rights, had voluntarily waived their rights, had indicated that they were willing to speak with the police, and had been treated fairly before giving each statement.

Genevia Pernell testified before both juries that she was a family friend of codefendants and that she knew their mother well. Pernell testified that she could account for Alton's whereabouts for the entire afternoon and evening of August 18, 2004.

Alton then testified before both juries concerning his alibi defense. He testified that he was never present at 4139 Canton Street on August 18, 2004. Alton testified that during his interrogation, he and Williams got into a verbal altercation and that Williams "punched [him] in the chest," punched him "more than five" times, and attempted to choke him. According to Alton, Wilson then wrote out a statement and forced him sign it. Alton testified that he only signed and initialed the statement because he was afraid of being further physically abused, and that he told Wilson "whatever [Wilson] wanted to hear" because he "didn't want to be hit no more." Alton claimed that he never told the police that he had shot anyone, that he had possessed a firearm, or that he had been present at 4139 Canton Street on August 18, 2004. Alton testified that although he signed the statement and had even written out a portion of it in his own handwriting, Wilson had simply fabricated the content of the document. Although Alton denied ever implicating himself in the homicides, he did admit that he had earlier told the police that "[Idolthus] probably did the murders."

Idolthus then testified before both juries that he had been selling crack at 4139 Canton Street on August 18, 2004. Idolthus testified that he had already left 4139 Canton Street for the day and was walking in the vicinity of Gratiot Avenue and East Grand Boulevard when Alton pulled up in a car and "told [him] to get in the car." According to Idolthus, Alton asked where he could get a gun. Idolthus testified that he had a 9 mm handgun in his possession at the time, but did not want to give it to Alton; therefore he told Alton that he could use a 12-guage shotgun that was kept in the upstairs bedroom at 4139 Canton Street.

Idolthus returned to 4139 Canton Street with Alton late in the afternoon of August 18, 2004. Alton and Idolthus entered the house and Idolthus went upstairs to get the 12-guage. Idolthus then returned downstairs and gave the shotgun to Alton. He testified that Alton took the shotgun, racked it, and walked toward the kitchen. Idolthus claimed that he remained in the living room and that he heard Alton shooting in the kitchen. He testified that he turned and saw Alton coming out of the kitchen with the shotgun and a .38-caliber revolver, and that Alton then shot Frank Olson in the dining room. Idolthus testified that he then ran from the house.

Idolthus maintained at trial that he did not shoot anyone and that Alton had killed all three victims. Idolthus testified that, although he possessed a 9 mm handgun at the time, he had never possessed a .38-caliber revolver and had never fired any shots at 4139 Canton Street. He also testified that he never discussed robbing the Canton Street house with Alton. The prosecution made clear that it believed the homicides were in some way related to a robbery or attempted robbery, but Idolthus retorted, "Why would I help rob my own dope house that I make money at?" Idolthus admitted that he signed and initialed both his first and second statements to police. But he claimed he was forced to sign the second statement only after Williams had wholly fabricated it in order to implicate him in the homicides.

Codefendants' sister testified that she could account for the whereabouts of Alton and Johnnie Jones for much of the afternoon and evening of August 18, 2004. Johnnie Jones testified that although he had been at 4139 Canton Street earlier in the afternoon of August 18, 2004, looking for Idolthus, he had left that location before Idolthus returned. Jones maintained that he was at a park drinking with friends for the entire afternoon and evening of August 18, 2004, that he had never been inside the house at 4139 Canton Street, and that he had never possessed a firearm in that vicinity.

Closing arguments regarding Alton Hubbard were given before Alton's jury only. Closing arguments regarding Idolthus Hubbard were given before Idolthus's jury only. Each jury was then instructed separately, outside the presence of the other jury. Neither Alton's counsel nor Idolthus's counsel objected to the jury instructions as read.

Idolthus's jury returned a verdict of guilty of three counts of first-degree premeditated murder, guilty of three counts of first-degree felony murder, and guilty of one count of felony-firearm. Alton's jury returned a verdict of guilty of one count of first-degree premeditated murder, guilty of two counts of second-degree murder, guilty of one count of felony-firearm, and guilty of one count of felon-in-possession. Jones was acquitted on all murder charges. The trial court noted that Idolthus had been convicted of three counts of first-degree premeditated murder and three counts of first-degree felony murder as "alternative theories," and vacated the felony murder convictions.

II. Issue Raised by both Codefendants—Severance of Trial

Codefendants argue that the trial court erred in refusing to completely sever their trials from one another. We disagree. We review for an abuse of discretion the trial court's decision on a motion to sever the trials of two or more codefendants. MCL 768.5; *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "The use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *Id*. at 351.

There is a strong public policy favoring the use of joint trials in the interests of administration and judicial economy, and no defendant has an absolute right to a separate trial. MCL 768.5; *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying that prejudice. *Hana*, *supra* at 345-346. Mere inconsistency of defenses in not enough to require severance of two or more codefendants; instead, the codefendants' defenses must be "irreconcilable." *Id*. at 349. "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not

suffice.'" *Id*. (citation omitted). Moreover, "[f]ingerpointing" between the codefendants is not a sufficient reason to grant completely separate trials. *Id*. at 360-361. Complete severance is mandated "'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Id*. at 359-360, quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). And, the codefendants' defenses must be "mutually exclusive," meaning that "'the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.'" *Id*. at 350 (citation omitted).

The risk of mutually exclusive defenses is heightened when the codefendants are tried together in a complex case and they have markedly different degrees of culpability. *Id*. at 346 n 7. Similarly, defenses may be mutually exclusive when the admission of probative evidence against one codefendant would constitute a *Bruton*[4] violation with respect to the other codefendant. *Id*. at 346 n 7; see also *People v Pipes*, 475 Mich 267, 271 n 10; 715 NW2d 290 (2006). Lastly, defenses may be mutually exclusive when probative evidence that is admitted against one codefendant is inadmissible against the other codefendant, or when one codefendant is denied the opportunity to present exculpatory evidence because it would be inadmissible with respect to the other codefendant. *Hana*, *supra* at 346 n 7.

In the present matter, both Alton and Idolthus were charged with three counts of first-degree premeditated murder, and alternatively with three counts of first-degree felony murder. Each codefendant was charged both as a principal and as an aider and abettor with respect to all three slayings. Therefore, it cannot be said that codefendants Alton and Idolthus were charged with markedly different degrees of culpability. Moreover, because each codefendant was charged both as a principal and as an aider and abettor, a single jury could have found both codefendants equally guilty of all three murders without any inconsistency between the verdicts. *Hana*, *supra* at 360-361. "[A] properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal." *Id*. at 361.

There was also no possibility of a *Bruton* error in this matter. Alton and Idolthus each testified at the joint trial, and both codefendants were therefore available as witnesses and subject to cross-examination. Because both codefendants testified and were subject to cross-examination, no *Bruton* error could have occurred. *Pipes*, *supra* at 275.

The risk of prejudice to either codefendant was reduced even more by the use of dual juries. *Hana*, *supra* at 360. As noted above, "[t]he use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *Id*. at 351. When mutually antagonistic defenses are presented during a joint trial, there is a risk that a single jury will convict one codefendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of the other codefendant. *Id*. at 360. However, "[t]hat dilemma is not presented to dual juries." *Id*. When separate juries are used, "[e]ach jury is

[4] *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

concerned only with the culpability of one defendant." *Id*. Thus, each separate jury can find its own defendant innocent or guilty "without the uneasiness of inconsistency that would be presented to a single jury in a joint trial. The chance for prejudice is therefore significantly lessened." *Id*.

The use of dual juries also alleviates the concern that a single jury may be exposed to evidence that is technically admissible against one codefendant but inadmissible against the other codefendant. See *id*. at 362. In a joint trial with separate juries, one jury may be excused during the presentation of evidence that is only admissible against the other jury's codefendant. In this way, no jury is exposed to evidence that may not be used against its own defendant. Similarly, the use of dual jury alleviates the concern that a single jury may be exposed to one defendant's exculpatory evidence that is inadmissible with respect to the other codefendant. See *id*. Indeed, if one defendant's exculpatory evidence is inadmissible with respect to a second codefendant, the second codefendant's jury may be removed during the presentation of the exculpatory proofs.

Codefendants recognize that the use of dual juries to some extent lessened the prejudice that might have resulted from the use of a single jury. Nonetheless, they suggest that completely separate trials were still required to completely protect each codefendant's trial rights.

First, we reject the suggestion that it was prejudicial for both juries to hear the testimony of both codefendants. A fair trial does not include the right to exclude fair and competent evidence. *Id*. at 362. In the present matter, because each codefendant testified at the joint trial, thereby waiving his Fifth Amendment rights regarding the events in question, the prosecution would have been able to call either defendant as a witness at the other codefendant's separate trial. *Id*. at 361. In other words, in the event that the circuit court had completely severed codefendants' trials, neither defendant would have been entitled to exclude the testimony of the other defendant. *Id*. Both codefendants' testimony would have been available for use at either of the codefendants' separate trials. *Id*. at 362.[5]

We recognize that a joint trial of codefendants presenting opposing defenses has negative implications for the accused and that there is almost always some degree of "incidental spillover prejudice" in joint trials. *Id*. at 347, 349. Further, we recognize that "'[d]efendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant.'" *Id*. at 347 n 8, quoting *United States v Tootick*, 952 F 2d 1078, 1082-1083 (CA 9, 1991). However, "'[i]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials[.]'" *Hana*, *supra* at 350, quoting *Zafiro*, *supra* at 540.

In the end, any defendant appealing a severance decision "must not only demonstrate that 'substantial rights' have been detrimentally affected, but also that severance is 'necessary,' i.e., that there is no other available avenue of relief." *Hana*, *supra* at 345. "The dual-jury procedure

[5] We note that it is impermissible to speculate or hypothesize regarding the manner in which completely separate trials might have differed from the joint trial that was actually held. *Hana*, *supra* at 361. Were we to employ such "what if" speculation, we could almost always imagine some potential prejudice. *Id*.

should be scrutinized with the same concern in mind that tempers a severance motion, i.e., whether it has prejudiced the substantial rights of the defendant. The precise issue is whether there was prejudice to substantial rights after the dual-jury system was employed." *Id*. at 351-352. In the instant matter, codefendants fail to show what trial rights were violated by the dual-jury procedure or how the juries' determinations were unreliable. Further, there is no indication that either codefendant was restricted in presenting a defense before his respective jury. "In the absence of demonstrated prejudice to defendants' substantial rights," we hold that the trial court did not abuse its discretion in conducting a joint trial with separate juries in this matter. *Id*. at 363.

III. Issues Raised by Idolthus Hubbard in Docket No. 263127

A. Materials Permitted in Jury Room

Idolthus argues that the trial court erred in not allowing his jury to have a copy of Alton's confession in the jury room. We disagree. In general, we review for an abuse of discretion a trial court's decision to permit materials and documents to be taken into the jury room during deliberations. *People v Benberry*, 24 Mich App 188, 191; 180 NW2d 391 (1970). However, because Idolthus failed to preserve this issue by raising a timely objection, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

It is error for the trial court to permit a jury, during deliberations, to take with it into the jury room any material that was not admitted into evidence. *Benberry*, *supra* at 191; see also MCR 6.414(I). "A trial court is not to provide the jury with unadmitted evidence." *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996). In *Davis*, the defendant's preliminary examination transcript was never admitted into evidence at trial, but portions of the preliminary examination testimony were used for impeachment purposes during cross-examination. *Id*. The court informed the jury that it could not have a copy of the transcript in the jury room because it had not been substantively admitted at trial, and instead instructed the jury that it should "rely on its memory" concerning the testimony in question. *Id*. This Court affirmed the trial court's ruling, stating that "[b]ecause the jury requested a transcript that had not been admitted into evidence, the trial court did not abuse its discretion in refusing to provide it to the jury." *Id*.

In the present matter, direct examination regarding Alton's confession and the substantive admission of the statement itself occurred before Alton's jury only. Alton's statement was never admitted into evidence before Idolthus's jury. However, Alton's statement was used on cross-examination before Idolthus's jury, and Idolthus's jury was therefore exposed to the existence of the statement and certain testimony concerning the statement. After deliberations had begun, the court received a note from Idolthus's jury asking, "May we have Alton's statement, please?" The court observed that because Alton's statement had been admitted as substantive evidence before Alton's jury only, Idolthus's jury could not have a copy of it in the jury room. Idolthus's counsel agreed, and did not object to the court's ruling in this regard. The trial court told the jurors that they could not have a copy of Alton's statement because it had only been admitted into evidence before the other jury. However, the trial court told the jurors that they could "use [their] collective memories to reconstruct the testimony about that statement that was given in front of [them]."

Like the trial court in *Davis*, *supra*, the trial court in this case properly withheld the requested materials from the jury room. Because Alton's confession was never admitted into evidence before Idolthus's jury, the trial court correctly instructed Idolthus's jury that it could not have a copy of the statement. *Id*. No error occurred, and Idolthus is entitled to no relief on this issue.

B. Admissibility of Alton's Statement Before Idolthus's Jury

Idolthus also asserts that the trial court erred in failing to sua sponte admit Alton's confession into evidence before his jury, and that Alton's confession "should have been admitted pursuant to the rules of evidence, as well as the doctrine of completeness." Again, we disagree. We typically review for an abuse of discretion a trial court's decision to admit evidence. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). However, neither Idolthus nor his attorney ever requested that the trial court admit Alton's statement into evidence before Idolthus's jury. Thus, because Idolthus failed to preserve this issue at trial, our review is limited to plain error that affected his substantial rights. *Carines*, *supra* at 763-764. We examine de novo as a question of law the proper interpretation of the rules of evidence. *Ackerman*, *supra* at 442.

As stated above, neither Idolthus nor his attorney ever requested that the trial court admit Alton's confession before Idolthus's jury. Idolthus cites no authority to support his suggestion that the trial court had an obligation to sua sponte present and admit the evidence. He states merely that "[a]ssuming the appropriateness of the cross-examination of each defendant in front of the co-defendant's jury . . . the statements themselves were admissible after the respective testimony and should have been provided to each jury for consideration during deliberation." An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, we note that if Idolthus had truly wanted Alton's confession admitted as evidence, he—and not the trial court—had the obligation to present and develop his case. We will not reverse on the basis of error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). To allow an appellant to assign as error something that he or his counsel deemed proper at trial would allow the appellant to harbor error as an appellate parachute. *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Because Idolthus never moved the admission of Alton's confession before his own jury, and because we have determined that it was incumbent on Idolthus—and not the trial court—to present his case, we need not address Idolthus's assertion that Alton's confession "should have been admitted pursuant to the rules of evidence, as well as the doctrine of completeness." Nevertheless, we cannot omit a brief discussion of the merits of this assertion.

The doctrine of completeness, codified at MRE 106, provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

This doctrine addresses the potential for misleading or confusing the issues when only a part or portion of a statement is introduced as evidence. Here, however, *none* of Alton's statement to the police was introduced as evidence before Idolthus's jury—instead, it was simply used for impeachment during cross-examination. Because no part of Alton's confession was admitted, there was no potential for confusion or unfairness of the type that MRE 106 is intended to redress. Even if Idolthus had moved for admission of Alton's confession, the doctrine of completeness would have provided him no assistance.

Idolthus also contends that Alton's confession was admissible as evidence pursuant to MRE 804(b)(3) and MRE 801(d)(2). Among other things, MRE 804(b)(3) excludes from the hearsay rule any out-of-court statement by an unavailable witness that was contrary to the witness's penal interest at the time it was made. We concede that Alton's confession was clearly contrary to Alton's penal interest. However, because Alton testified before Idolthus's jury, thereby waiving his Fifth Amendment rights, he was in no way "unavailable" for purposes of MRE 804(b)(3). Accordingly, MRE 804(b)(3) does not apply in this situation.

MRE 801(d)(2) provides that an admission by a party-opponent "is not hearsay." Under this rule, the confession of one defendant is admissible into evidence against that specific defendant because the confession constitutes an admission by a party opponent. MRE 801(d)(2)(A). However, one defendant's statement inculpating *another* codefendant is not admissible against that other codefendant because it constitutes hearsay under the traditional rules of evidence. MRE 801(c); see also *United States v Hay*, 122 F 3d 1233, 1236-1237 (CA 9, 1997); and *State v Means*, 547 NW2d 615, 623 (Iowa App, 1996). In a joint trial, one codefendant is not a party-opponent of the other codefendant. See *United States v Harwood*, 998 F 2d 91, 97-98 (CA 2, 1993). In such cases, the prosecution—and not the codefendant—is the party opponent of the other defendant. *Id*.; see also *United States v Gossett*, 877 F 2d 901, 906 (CA 11, 1989). Here, Alton's statement was not admissible before Idolthus's jury under MRE 801(d)(2) "because the admission sought to be introduced was made by a co-defendant who is not a party opponent. The [prosecution] is the party opponent of both defendants." *Id*. For the purposes of Idolthus's trial, Alton's statement to the police was inadmissible hearsay that did not fall into any recognized exception.

Finally, we note that extrinsic evidence of prior inconsistent statements may be introduced for impeachment purposes if the witness is permitted to examine and attempt to explain or rebut the evidence. MRE 613(b). As noted, Alton's statement to the police was used on cross-examination before Idolthus's jury only for the purpose of impeaching Alton's credibility. Assuming compliance with the requirements of MRE 613(b), the use of Alton's statement itself was permissible for this limited purpose. However, extrinsic evidence used to impeach witness credibility under MRE 613(b) may not be introduced as evidence for the improper purpose of proving the truth of the matter asserted. *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994). Moreover, although extrinsic evidence of prior inconsistent hearsay statements may be introduced for impeachment purposes, it may not be substantively admitted as an exhibit at trial. *People v Alexander*, 112 Mich App 74, 77; 314 NW2d 801 (1981). In short, MRE 613(b) would not have permitted the substantive admission of Alton's confession as a trial exhibit. *Id*.

The trial court was not required to sua sponte admit Alton's statement to Idolthus's jury. Further, even if Idolthus had tried to substantively admit Alton's statement into evidence, he

would have been unsuccessful. In short, for the purposes of trial before Idolthus's jury, Alton's confession constituted inadmissible hearsay. No error occurred in this regard.

C. Idolthus's Statements to the Police

Idolthus next argues that the trial court erred in ruling that his statements to the police were voluntary, knowing, and intelligent. We disagree. Whether a confession was voluntary, knowing, and intelligent is a question for the trial court. *Etheridge*, *supra* at 57. When reviewing a trial court's determination of the voluntariness of a statement, this Court must examine the entire record and make an independent determination, but we will not disturb the trial court's factual findings absent clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). We give special deference to the trial court's superior ability to assess the demeanor and credibility of the witnesses at a *Walker* hearing. *People v Kimble*, 252 Mich App 269, 273; 651 NW2d 798 (2002).

A custodial statement obtained from a defendant is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *Daoud*, *supra* at 634.

> Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. While the voluntariness prong is determined solely by examining police conduct, a statement made pursuant to police questioning may be suppressed in the absence of police coercion if the defendant was incapable of knowingly and intelligently waiving his constitutional rights. Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. [*People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997) (citations omitted).]

Whether a statement is voluntary is to be determined using certain non-exclusive enumerated factors. See *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). In determining voluntariness, the court should consider all the circumstances, including (1) the age of the accused, (2) his lack of education or his intelligence level, (3) the extent of his previous experience with the police, (4) the repeated and prolonged nature of the questioning, (5) the length of the detention of the accused before he gave the statement, (6) the lack of any advice regarding constitutional rights, (7) whether there was an unnecessary delay before the accused gave the confession, (8) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement, (9) whether the accused was deprived of food, sleep, or medical attention, (10) whether the accused was physically abused, and (11) whether the suspect was threatened with abuse. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005), citing *Cipriano*, *supra* at 333-334. "No single factor is determinative." *Tierney*, *supra* at 708. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano*, *supra* at 334.

Idolthus was arrested at approximately 5:00 p.m. on the afternoon of August 23, 2004. He then made two separate statements to the police—one at about 9:30 p.m. that evening, and the other at about 1:15 a.m. the following morning. In concluding that Idolthus voluntarily waived his Fifth Amendment rights before each statement, the trial court analyzed the relevant factors and the evidence that it found most credible. The facts found by the trial court have support in the record, and the record does not compel a conclusion that the two statements were anything other than voluntary.

Idolthus argues that the elapsed time between his arrest and his statements supports a finding that the statements were involuntary. He also contends that the trial court should have found the second statement involuntary because, at the time of the second statement, "[t]he attitude of the police when confronting Idolthus with Alton's allegation was patently accusatory," and he was therefore "operating at a heightened level of confusion." These arguments are unavailing. The elapsed time between Idolthus's arrest and his second statement was at most nine hours. Although such a time period cannot be considered brief, it simply does not constitute the type of prolonged and extended custody that might render a statement involuntary. Regarding the assertion that Idolthus was "operating at a heightened level of confusion" during his second interview because the police had confronted him with his brother's statement, we note that police interviews are frequently confrontational and accusatory. However, the police witnesses at the *Walker* hearing specifically testified that they did not threaten or injure Idolthus, that they made no promises to him, and that they did not deprive him of any essential needs while in their custody. The mere fact that a suspect may have become "confus[ed]" when the police confronted him with potentially inculpatory evidence does not compel the conclusion that any subsequent statement was necessarily involuntary.

As noted above, we give deference to the trial court's assessment of witness demeanor and credibility at a *Walker* hearing. *Kimble*, *supra* at 273. After assessing the witnesses' credibility, the trial court properly weighed the relevant factors and determined that both of Idolthus's statements were freely given after voluntary waivers.[6] *Tierney*, *supra* at 708-709. The trial court did not clearly err in reaching this determination.

Idolthus next argues that his statements were not knowing and intelligent because he "did not possess the cognitive and intellectual skills required to fully and validly waive his

[6] Idolthus also argues that he never actually made the two statements in the first instance, but was nevertheless "forced to sign off on [them] as his own." In other words, Idolthus asserts that the police wholly fabricated portions of the statements, and that the trial court should have found the statements involuntary for this reason. The question whether a statement was voluntary and the question whether a statement was actually made in the first instance are two separate and discrete inquiries. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990); *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981). Although the question whether a statement was voluntary is properly within the purview of the trial court at the *Walker* hearing, the question whether a statement was actually made in the first instance is solely a matter for the jury. *Neal*, *supra* at 371-372. Here, the jury was instructed that it could not consider Idolthus's statements unless it first determined that Idolthus had actually made the statements to police. Based on the verdicts, we note that the jury apparently found the statements to be genuine and authentic.

constitutional rights." To establish that a defendant's waiver of his Fifth Amendment rights was knowingly and intelligently made, "'the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.'" *Id*. at 709, quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). A defendant need not fully understand the ramifications and consequences of waiving his rights, *Daoud*, *supra* at 636, and the test is not whether it was wise or smart for the defendant to admit his culpability, *Cheatham*, *supra* at 29. A defendant need only know of his available options and make a rational decision—not necessarily the best decision. *Id.* at 28. Whether a waiver is knowing and intelligent depends on "the suspect's level of understanding, irrespective of police behavior." *Daoud*, *supra* at 636.

Idolthus asserts, without more, that he was not able to knowingly and intelligently waive his Fifth Amendment rights because he was young, learning-disabled, and a below-average reader. However, Idolthus concedes that he is able to read and is not illiterate. In fact, he concedes that some of the evidence in this matter showed that "he actually had the ability to occasionally perform well in this area [of reading]."

The evidence adduced at the *Walker* hearing indicated that the police informed Idolthus of his *Miranda* rights before each of his statements, both aloud and by giving him a constitutional rights notification form. According to more than one witness, Idolthus appeared able to read, was able to communicate well, and was cooperative with the interviewing police officers. Also according to the witnesses, Idolthus indicated that he wished to waive his Fifth Amendment rights and speak with the police. He never asked for an attorney, and did not at any time state that he wanted to discontinue the interviews. Finally, the witnesses testified that Idolthus understood the questions asked by the police, did not appear to be injured or ill, and did not appear to be under the influence of drugs or alcohol. Idolthus, himself, admitted that he signed and initialed the two statements.

Idolthus also suggests that he was unable to knowingly and intelligently waive his Fifth Amendment rights in light of his age. However, we reject this argument. Idolthus was 19 years old at the time of his arrest—sufficiently mature to understand his rights.

While youth, learning disability, and emotional impairment must not be discounted in assessing whether a defendant's waiver was knowing and intelligent, these factors should not be "taken to elevate the obligations of the police to unreasonable levels." *People v Abraham*, 234 Mich App 640, 648; 599 NW2d 736 (1999). Although Idolthus may be learning disabled to some degree, and may have a somewhat-limited reading ability, there was no credible evidence introduced at the *Walker* hearing to indicate that he did not minimally understand the *Miranda* warnings as they were given. The trial court had a superior ability to assess the credibility of the witnesses, *Kimble*, *supra* at 273, and properly weighed the relevant factors to determine that both of Idolthus's Fifth Amendment waivers were knowing and intelligent. The court did not clearly err in finding that Idolthus's statements were knowingly and intelligently made.

D. Ineffective Assistance of Counsel

Idolthus next argues that trial counsel was ineffective for several reasons. We disagree. Idolthus failed to preserve his claims of ineffective assistance of counsel by requesting a new

trial or moving for a *Ginther*[7] hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Review of unpreserved claims of ineffective assistance of counsel is limited to error apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Id.*

Idolthus first asserts that his counsel was ineffective for failing to substantively admit the content of Alton's confession into evidence before his jury, and for failing to advocate the use of Alton's statement by his jury during deliberations. As discussed above, Alton's confession was hearsay, and was not admissible as evidence before Idolthus's jury. Moreover, even though documentation of Alton's statement was admissible for purposes of impeachment under MRE 613(b), it would not have been substantively admissible as a trial exhibit or to prove the truth of the matter asserted. *Stanaway*, *supra* at 692-693; *Alexander*, *supra* at 77. During deliberations, a jury may not take with it into the jury room any material that was not substantively admitted as an exhibit at trial. *Benberry, supra* at 191; see also MCR 6.414(I).

Counsel is not ineffective for failing to advocate a meritless position or make a futile argument. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *Snider*, *supra* at 425. Alton's statement to the police was not substantively admissible, and Idolthus's jury was not permitted to have it in the jury room during deliberations. Idolthus's counsel was not ineffective for failing to argue otherwise at trial. *Mack*, *supra* at 130; *Snider*, *supra* at 425.

Idolthus next argues that his trial counsel was ineffective for failing to introduce sufficient evidence of his poor reading skills and learning disabilities at the *Walker* hearing. Idolthus admitted at the *Walker* hearing that he signed and initialed both of his statements to the police, and that he was able to read. Moreover, a Detroit Public Schools Individualized Education Program Report indicated that reading comprehension was actually one of Idolthus's strengths in school.

Idolthus fails to identify on appeal any particular evidence that he believes his trial counsel should have introduced. He names no specific individuals who could have testified regarding his alleged learning disability. Nor does he come forward with any specific evidence to support his claims of poor reading skills, an incapacity to minimally comprehend, or an inability to appropriately communicate with others. We are not required to make defendant's arguments for him, and Idolthus's claimed error in this regard is abandoned. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Even if this issue had not been abandoned, in light of Idolthus's failure to come forward with any particular evidence that could have helped his case, we are at pains to identify what additional evidence Idolthus's lawyer could have introduced concerning this issue. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Because there was apparently no additional, specific evidence to present, counsel necessarily did not

[7] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

perform "below an objective standard of reasonableness" by failing to introduce further evidence on this matter. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The record indicates no ineffective assistance of counsel in this regard.

Lastly, Idolthus argues that his counsel was ineffective for failing to adequately impeach the testimony of Officer Williams. Idolthus asserts that certain portions of Williams's testimony at the *Walker* hearing were inconsistent with Williams's testimony at trial, and that counsel therefore should have impeached Williams at trial on this ground. The decision to question a witness is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Whether and how to impeach a witness are similarly matters of trial strategy left to counsel's professional judgment. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Rockey*, *supra* at 76-77. The record does not show that trial counsel's failure to impeach Williams with respect to this minor detail of his testimony actually prejudiced Idolthus in any way. We perceive no error in counsel's performance. *Toma*, *supra* at 302.

E. Sufficiency of the Evidence

Idolthus next argues that there was insufficient evidence presented at trial to support his convictions of first-degree murder. We disagree. Due process requires that the evidence show guilt beyond a reasonable doubt in order to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing a claim of insufficient evidence, we view the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). We must afford deference to the factfinder's special opportunity and ability to determine the credibility of the witnesses. *Wolfe*, *supra* at 514-515. "It is the jury's task to weigh the evidence and decide which testimony to believe." *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982).

Idolthus first contends that there was insufficient evidence to support his conviction of first-degree murder with respect to the death of Annie Rivers. In order to convict a defendant of first-degree premeditated murder, "the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. *Id*. at 371.

In his second statement,[8] Idolthus confessed that he had shot Rivers, and that Alton had shot Edmonds and Olson. Therefore, contrary to Idolthus's assertion on appeal, there was

[8] Following the *Walker* hearing, the trial court found that Idolthus's second statement to the police was voluntary, knowing, and intelligent, and allowed the use of that statement at trial before Idolthus's jury. We have now affirmed that ruling. Moreover, Idolthus's jury was instructed not to consider Idolthus's statements to the police unless it first determined that Idolthus had actually made the statements. It appears that the jury found Idolthus's statements to

(continued…)

evidence that he personally killed at least one of the victims. Frequently, "'when the defendant confesses, there can be little doubt concerning his guilt.'" *Pipes*, *supra* at 281, quoting *People v Dunn*, 446 Mich 409, 424; 521 NW2d 255 (1994). "Indeed, 'the defendant's *own* confession is probably the most probative and damaging evidence that can be admitted against him.'" *Pipes*, *supra* at 281 (emphasis in original; citation omitted). Furthermore, although Alton's statement to the police was not substantively admitted into evidence before Idolthus's jury, the jurors heard testimony about it when Alton was cross-examined before them. Finally, Idolthus's jury heard Officer Williams testify that Idolthus's second statement was consistent with Alton's statement. Therefore, Idolthus's jury had other, independent bases on which to conclude that Idolthus had personally shot and killed Rivers.

Idolthus's jury heard Idolthus testify himself, and also heard testimony regarding Idolthus's first custodial statement to the police. Idolthus indicated in his first statement to the police that he had been present at 4139 Canton Street during the shootings, that he had possessed a .38-caliber revolver that was identical to the one possessed by Alton, but that he shot no one. Similarly, Idolthus testified at trial that although he had been present during the shootings, he had never entered the kitchen, and had never shot anyone. Indeed, Idolthus testified that Alton shot all three victims.

However, Idolthus's jury also heard testimony concerning Idolthus's second custodial statement to the police. In contrast to his trial testimony and first custodial statement, Idolthus indicated in his second confession that he not been completely truthful in his first statement, and that he had in fact shot the "lady" in "the kitchen."

Idolthus's jury had a special opportunity to view Idolthus's demeanor in the courtroom and to assess his credibility on the witness stand. *Wolfe*, *supra* at 514-515. We must defer to that special opportunity. *Id*. Although Idolthus testified at trial that he was never in the kitchen and did not kill anyone at 4139 Canton Street, his second statement to the police indicated that he was indeed in the kitchen, that he shot Rivers there, and that he possessed a handgun at that time that was identical to the type used to kill Rivers. Conflicts in the evidence must be resolved in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, this Court does not weigh competing evidence; that is the jury's function. *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002). Viewing the competing evidence in the light most favorable to the prosecution, we conclude that a rational tier of fact could have found beyond a reasonable doubt that Idolthus Hubbard killed Annie Rivers in the kitchen of 4139 Canton Street.

We also conclude that a rational trier of fact could have found beyond a reasonable doubt that Idolthus intended to kill Rivers, and that he in fact premeditated and deliberated the killing. *Marsack*, *supra* at 370. The intent to kill may be inferred from any facts in evidence, including minimal circumstantial proofs. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The intent to kill may be inferred from the use of a lethal weapon. *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Marsack*, *supra* at 370-371. Factors that may

(…continued)

be genuine and authentic.

be considered to establish premeditation include "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998). "Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation." *Id*. at 301.

The medical examiner testified that Rivers sustained three gunshot wounds—one to the right wrist, one to the right arm, and one to the shoulder and chest. The medical examiner testified that the gunshot wounds to the wrist and arm would not have been fatal, but the wound to the shoulder and chest caused Rivers's death. He testified that, based on the type and trajectory of the wounds themselves, Rivers was likely in a seated position when she was shot and killed. Rivers was a small and short woman aged in her sixties. No weapons were found on or near Rivers's body.

Idolthus shot Rivers three times with a handgun while she was seated in the kitchen. We conclude that this evidence was sufficient to allow a rational jury to find that Idolthus possessed the requisite intent to kill. *McRunels*, *supra* at 181; *Ray*, *supra* at 615. We also conclude that there was sufficient evidence of premeditation and deliberation in this matter. The fact that Idolthus inflicted two nonfatal gunshot wounds before shooting Rivers a third time in the shoulder and chest indicates that he had sufficient time to take a second look. *Marsack*, *supra* at 370-371. Moreover, although the use of a lethal weapon is not alone adequate to show premeditation, the killing of an unarmed victim "is sufficient when coupled with the use of a firearm to establish beyond a reasonable doubt a premeditated intention to kill." *Jones*, *supra* at 553, citing *People v Vinunzo*, 212 Mich 472, 475; 180 NW 502 (1920). A rational jury could have found beyond a reasonable doubt that Idolthus intended to kill Rivers, and that he in fact did so with premeditation and deliberation. We conclude that there was sufficient evidence to support Idolthus's conviction of first-degree premeditated murder with respect to the killing of Annie Rivers.

Idolthus also argues that there was insufficient evidence to support his convictions of first-degree murder with respect to the killings of Frank Olson and Jerome Edmonds. We concede that there was little or no evidence that Idolthus personally shot Olson and Rivers. However, Idolthus was charged not only as a principal, but also under a theory of aiding and abetting.

Aiding and abetting is defined by MCL 767.39, which provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

"The general view taken is that a person who does not actually commit the homicidal act may be regarded as a participant in the homicide and, if the person encourages, assists or advises another so as to induce the unlawful act, then the person may be held criminally responsible as an aider and abettor." *People v Daniels*, 172 Mich App 374, 383; 431 NW2d 846 (1988). A conviction

of aiding and abetting requires proof that (1) the underlying crime was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that aided and assisted the other person in committing the crime, and (3) the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).

Idolthus testified that a shotgun was kept in the upstairs bedroom at 4139 Canton Street, and that the shotgun belonged to his drug supplier. Idolthus testified that he took Alton to 4139 Canton Street on August 18, 2004, for the sole purpose of obtaining the shotgun, but that he never asked Alton why he needed to use the gun. In his statements to the police, Idolthus indicated that both he and Alton already possessed similar .38-caliber revolvers at the time, and that he additionally possessed a 9 mm handgun. Officer Williams testified at trial that, based on his understanding of Idolthus's statements, each brother had possessed a separate but similar .38-caliber revolver at the time of the shootings.

In his first statement to the police, Idolthus indicated that he and Alton had never discussed the possibility of robbing 4139 Canton Street, and that he had no indication that Alton intended to rob anyone inside. However, Idolthus nonetheless suggested in his first statement that he believed the shootings were robbery-related, stating that Alton had told him that he was "about to get this bread." Similarly, Idolthus suggested at trial that he believed Alton's motive for shooting Edmonds and Olson was either robbery, attempted robbery, or the elimination of potential witnesses to a robbery.

When competing evidence is introduced at trial, we must afford deference to the factfinder's special opportunity and ability to determine the credibility of the witnesses. *Wolfe*, *supra* at 514-515. "It is the jury's task to weigh the evidence and decide which testimony to believe." *Jones*, *supra* at 553. Idolthus's trial testimony, first statement to the police, and second statement to the police all tell slightly different stories. What is clear from Idolthus's three accounts, however, is that Alton and Idolthus already had several guns in their possession just before the shootings, that the brothers agreed for some reason to go together to the house where Idolthus dealt crack, and that the brothers cooperated in retrieving yet another gun from the upstairs bedroom upon their arrival at 4139 Canton Street. Although Idolthus suggested that he and Alton never discussed robbing 4139 Canton Street prior to the shootings, he insisted at trial that robbery must have been Alton's motive for the killings.

An aider and abettor's state of mind may be inferred from the facts and circumstances, such as a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled on other grounds *People v Mass*, 464 Mich 615, 627-628 (2001). Because of the difficulty of proving an actor's state of mind, only minimal circumstantial evidence is necessary. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Further, "[i]n determining whether a defendant assisted in the commission of the crime, the amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime." *People v Moore*, 470 Mich 56, 71; 679 NW2d 41 (2004).

Idolthus personally testified at trial that Alton killed Olson and Edmonds. He also testified that he assisted Alton in obtaining the shotgun that was used to kill Edmonds. Finally,

although Idolthus disclaimed any prior knowledge of a robbery plan, he—and not Alton—sold drugs out of 4139 Canton Street and was therefore familiar with the people who frequented the house and the location where money was kept. In light of Idolthus's testimony inculpating Alton, the lethal weapons possessed by Idolthus at the time of the incident, the fact that Idolthus directed Alton to the place of the killings for the purpose of obtaining an additional gun, Idolthus's familiarity with the house at 4139 Canton Street, and the close connection between Idolthus and Alton, a rational jury could have found beyond a reasonable doubt that (1) the underlying killings were committed by Alton, (2) Idolthus performed acts that assisted Alton in carrying out the shootings, and (3) Idolthus had knowledge that Alton intended the crimes at the time he gave assistance. See *Smielewski*, *supra* at 207. We conclude that there was sufficient evidence of aiding and abetting to support Idolthus's convictions of first-degree premeditated murder with respect to the killings of Frank Olson and Jerome Edmonds.[9]

F. Admissibility of Photographic Evidence

Finally, Idolthus asserts that the trial court abused its discretion in admitting into evidence people's exhibit 30, a photograph of Annie Rivers's right arm. We disagree. Idolthus preserved this issue through timely objection at trial. We review for an abuse of discretion the trial court's decision to admit photographic evidence. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

Idolthus first argues that the photograph was irrelevant. For a photograph to be admissible, it must be relevant. MRE 402; *People v Mills*, 450 Mich 61, 66; 537 NW2d 909, modified 450 Mich 1212 (1995). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Among other things, photographs can be relevant to establish a defendant's intent, to negate the defense of accident, to corroborate expert testimony, or to assist the jury in determining credibility. *Mills*, *supra* at 68-74.

Because the photograph in question showed at least one of the gunshot wounds to Rivers's arm, it supported the prosecution's theory that the murder of Rivers was premeditated and deliberate. As we observed above, the fact that Idolthus inflicted two nonfatal gunshots to Rivers's arm and wrist before inflicting the fatal shot indicates that he had sufficient time to take a second look. Sufficient time to take a second look is necessary to establish premeditation and deliberation, *Marsack*, *supra* at 370-371, and premeditation and deliberation are essential elements of first-degree premeditated murder. Thus, the photograph was relevant for purposes of proving the elements of the charged offense. MRE 401.

Idolthus also argues that the photograph should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. Even if relevant, evidence is inadmissible if the probative value of the evidence is substantially outweighed by the danger

[9] Because the trial court vacated Idolthus's first-degree felony murder convictions, we do not address those convictions in this opinion.

of unfair prejudice. MRE 403; *Mills*, *supra* at 66. We have reviewed the photograph in question. The photograph is not overtly gruesome and contains very little blood or other detail. Any possible prejudice to defendant did not substantially outweigh the probative value of the evidence. MRE 403. The trial court did not abuse its discretion in admitting the photograph.

IV. Issues Raised by Alton Hubbard in Docket No 263361

A. Alton's Statement to the Police

Alton argues that he was coerced into giving and signing his confession through abusive police conduct, and that the trial court therefore erred in ruling that the confession was voluntarily given.[10] We disagree. When reviewing a trial court's determination of the voluntariness of a statement, this Court must examine the entire record and make an independent determination, but we will not disturb the trial court's factual findings absent clear error. *Daoud*, *supra* at 629; *Shipley*, *supra* at 372-373.

A custodial statement is admissible only if the defendant voluntarily waived his Fifth Amendment rights. *Miranda*, *supra* at 444. The prosecution has the burden of establishing a valid waiver by a preponderance of the evidence. *Daoud*, *supra* at 634. The voluntariness of a custodial statement "is determined solely by examining police conduct." *Howard, supra* at 538. Whether a statement is voluntary is to be determined using the factors enumerated in *Cipriano, supra*. Among other things, these factors include whether the accused was deprived of any essential needs, whether the accused was physically abused, and whether the accused was threatened with abuse. *Tierney*, *supra* at 708, citing *Cipriano*, *supra* at 333-334. "No single factor is determinative." *Tierney*, *supra* at 708. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano*, *supra* at 334.

It is axiomatic that suppression of a defendant's statement is required upon established facts of improper police conduct on appeal. *Abraham*, *supra* at 644. "A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception . . . and must be the product of an essentially free and unconstrained choice by its maker." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986). "The voluntariness of a waiver of this [Fifth Amendment] privilege has always depended on the absence of police overreaching." *Id*.

At the *Walker* hearing, two police witnesses testified that after Alton was arrested and informed of his constitutional rights,[11] he requested a cigarette break. Williams and Wilson

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[10] Alton argues only that his statement was involuntary, and does not argue that his statement was not knowing or intelligent. To the extent that Alton argues that he never actually made the statement, the authenticity of the statement itself was solely a question for the jury, which was instructed that it could not consider the statement unless it first determined that the statement was genuinely made by Alton. *Neal*, *supra* at 371-372.

[11] Wilson testified that he provided Alton a constitutional rights notification form, had Alton read

(continued…)

testified that they therefore took Alton into a breezeway area between the Seventh Precinct building and garage. Williams testified that as Wilson and Alton smoked cigarettes in the breezeway, he told Alton that Idolthus had implicated him in the murders. Alton then "got a little angry." Nonetheless, Williams and Wilson both testified that after Alton was finished smoking, he went back inside to make a statement to Wilson. Wilson and Williams testified that they never hit, struck, choked, or punched Alton.

After returning inside from the cigarette break, Alton made a statement and signed it. Wilson testified that Alton never asked for a lawyer, never stated that he wanted to discontinue the interview, and never invoked his right to remain silent. At the bottom of the statement, Alton wrote in his own handwriting: "I would say that I'm sorry, I never wanted to hurt their family or them in any way, and if I could change this problem I would but I can't, and I'm sorry for that, I love my brother." Wilson testified that he at no time coerced Alton into confessing or giving the statement.

Alton testified differently at the *Walker* hearing. He claimed that after arriving at the Seventh Precinct, Wilson informed him that "a female" had "picked [him] out of the lineup" in which he had participated earlier that day.[12] Alton testified that he freely signed the *Miranda* notification form, and that he did not mind talking to the police because he had "nothing to do with the murders." Alton claimed, however, that he told Wilson that he wanted a lawyer. According to Alton, Wilson nevertheless began questioning him and then took him into the breezeway area near the garage, where Officer Williams "was waiting." Alton testified that he never asked for a cigarette break and that he was not permitted to smoke while present in the breezeway. In the breezeway area, Williams told Alton that Idolthus had implicated him in the homicides. Alton admitted that he then became angry and began yelling at Williams. He testified that, while he was handcuffed, Williams then began to hit him, punched him in the chest, and choked him. However, Alton admitted that he never requested medical treatment and that he never made any type of complaint regarding Williams's alleged conduct.

Alton admitted that he signed and initialed the confession prepared by the police, and that he wrote out the answer to the final question in his own handwriting. However, he testified that he only did so because he had been physically abused and was afraid of further mistreatment. Alton testified that after Williams had hit, choked, and punched him, he decided to tell Wilson "whatever he wanted me to say."

(…continued)

it aloud, and asked Alton whether he understood his rights. According to Wilson, Alton explained that he had a G.E.D., appeared to understand his rights, and was able to read and communicate well. Wilson testified that Alton did not appear to be under the influence of drugs or alcohol. Wilson testified that after Alton signed the constitutional rights notification form, he agreed to make a statement to the police. Alton admitted that he freely signed the *Miranda* form and that he was not under the influence of drugs or alcohol at the time.

[12] Connie Davenport and Tony Johnson, both of whom were present at 4139 Canton Street during the shootings, witnessed the lineup. Neither identified Alton at the time of the lineup. Wilson denied ever telling Alton that either witness had identified him at the lineup.

In this instance, the *Walker* hearing essentially became a credibility contest between Alton and the police witnesses. We give special deference to the trial court's superior ability to assess the demeanor and credibility of the witnesses at a *Walker* hearing. *Kimble*, *supra* at 273. Although Alton asserted that his confession was extracted through physically abusive police conduct, Wilson and Williams both testified to the contrary. Moreover, although Alton claimed that he was hit, punched, and choked, he admitted that he never sought medical attention following his interview and that he never complained of the alleged abuse to Williams's and Wilson's superiors. It was the duty of the trial court to listen to the witnesses and to assign weight to the testimony that it found most believable. Here, the court evidently determined that Alton's testimony lacked credibility, assigning greater weight to the testimony of Wilson and Williams than to the testimony of Alton. We perceive no clear error in this determination. The trial court did not clearly err in ruling that Alton's statement to the police was voluntarily given as a product of his own free will.

B. Propriety of In-Court Identification

Alton next argues in a supplemental brief filed *in propria persona* that Connie Davenport's identification of him at trial as one of the shooters was tainted by an unduly suggestive identification at the preliminary examination. Because Alton never challenged Davenport's identification through an appropriate motion or objection, this issue is unpreserved, and our review is limited to plain error affecting his substantial rights. *Carines*, *supra* at 761-767.

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To show a due-process violation, "'[the] defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification."' *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

We recognize that an in-court identification at the preliminary examination can be an impermissively suggestive under certain circumstances. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). But because this issue was never properly raised below, the record does not provide a basis for concluding that the circumstances of the preliminary examination were unduly suggestive. Furthermore, even if an unduly suggestive identification procedure in fact took place, it is not apparent that the victim lacked an independent basis for her in-court identification. *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000). Davenport was present at 4139 Concord Street at the time of the shootings, and it is uncontested that she witnessed—at least in part—certain events that transpired in the house. We concede that certain aspects of Davenport's testimony were internally inconsistent and that Davenport testified that she did not personally know Alton at the time, referring to him only as "the brother of Gage."[13] However, Davenport insisted at trial that from her vantage point in the living room, she had seen Alton exiting the kitchen immediately after the shootings with at least one firearm

[13] Idolthus was apparently known by the street name "Gage."

in his possession. Defendant has not shown that the victim's identification testimony at trial constituted plain error.

Moreover, although Connie Davenport did not identify Alton at the corporeal lineup that she witnessed on August 23, 2004, and only later identified him at the preliminary examination, Alton has not shown that his substantial rights were affected by Davenport's ultimate identification testimony. Alton's jury was made fully aware that Davenport had failed to identify Alton at the lineup and that she had only later identified him at the preliminary examination. The jury was free to use this knowledge in assessing the credibility of Davenport's identification testimony at trial. Moreover, even in the absence of Davenport's testimony, there was other evidence implicating Alton as one of the shooters. Indeed, Alton indicated in his own statement to police that he had personally shot Edmonds and Olson. Consequently, Alton has failed to demonstrate that he is actually innocent, or that any error seriously affected the fairness, integrity, or public reputation of his trial. *Carines*, *supra*. This unpreserved issue warrants no appellate relief.

C. Effective Assistance of Counsel

Alton also argues in his supplemental brief filed *in propria persona* that he was denied the effective assistance of trial counsel in two different ways. We disagree. Alton failed to preserve his claims of ineffective assistance of counsel by requesting a new trial or moving for a *Ginther* hearing. *Snider*, *supra* at 423. Review of unpreserved claims of ineffective assistance of counsel is limited to error apparent on the record. *Sabin*, *supra* at 659. "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Id.*

Alton first contends that his trial counsel was ineffective for failing to retain an expert witness on the issue of eyewitness misidentification. He cites numerous scholarly treatises and articles for the proposition that misidentification by eyewitnesses is common, and often leads to wrongful convictions. We concede that misidentification does indeed occur, and have no doubt that it could lead to an unjust result in the absence of other, independent inculpatory evidence. However, here Davenport's identification testimony at trial was hardly the only evidence tending to implicate Alton in the homicides. Alton claims that apart from the testimony of Davenport, "there was absolutely no other direct, circumstantial, or even inferential evidence presented at trial to indicate [that Alton] was one of the perpetrators of the crimes charged." Conveniently, Alton disregards his own confession, which, as we have determined, was freely and voluntarily given to the police. In that confession, Alton admitted to personally killing both Edmonds and Olson. Moreover, Alton disregards the testimony of Idolthus, who testified before Alton's jury that Alton had committed the homicides. Finally, as we noted above, although Davenport failed to identify Alton at the lineup, and only later identified him at the preliminary examination, Alton's jury was made fully aware of these facts. Thus, the jury was free to credit or discredit Davenport's identification testimony at trial according to its own best judgment. In light of the forgoing, we cannot conclude that Alton was actually prejudiced by counsel's failure to retain an expert on eyewitness misidentification. Even absent counsel's alleged error, the outcome of trial would not have been different. *Toma*, *supra* at 302. The record indicates no ineffective assistance of counsel in this regard.

Alton also contends that trial counsel was ineffective for failing to request an in-court lineup at or before the preliminary examination. Michigan law permits a preliminary-examination court to grant a defendant's motion for a lineup if the court chooses to do so in its discretion. See *People v East Lansing Municipal Judge*, 42 Mich App 32, 37-38; 201 NW2d 318 (1972); see also *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981). Because granting a pretrial lineup is within the court's discretion, a defendant is not entitled to such a lineup as a matter of right. *People v Buchanan*, 107 Mich App 648, 653; 309 NW2d 691 (1981).

The court would have been authorized to grant a lineup in its discretion at or before the preliminary examination. However, even if a lineup had been granted and Davenport had failed to identify Alton as one of the shooters, sufficient independent evidence of Alton's guilt—including Alton's own confession—still would have existed. In order to establish ineffective assistance of counsel, a defendant must demonstrate a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Toma*, *supra* at 302-303. Because it is not clear from the record that counsel's actions in this respect were decisive to the outcome of the proceedings, we cannot conclude that counsel's failure to request an in-court lineup resulted in actual prejudice. *Id*.

D. Reasonable Doubt Jury Instruction

Alton next argues in his supplemental brief that the trial court erred in giving the standard jury instruction on reasonable doubt. He asserts that the instruction is improper and shifts the burden of proof to the defense. We disagree. Not only did Alton fail to timely object to the court's reasonable-doubt instruction, his attorney expressed satisfaction with it. When a party expresses satisfaction with the jury instructions, that party waives review of any issue pertaining to those instructions. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

In any event, we note that the instructions were adequate as given in the instant matter. As long as the trial court instructs the jury that the prosecution must prove the defendant's guilt beyond a reasonable doubt, no particular form of words is required. *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994). We have previously held that CJI2d 3.2, the reasonable doubt instruction used by the trial court in this matter, presents an adequate and sufficient instruction concerning the concept of reasonable doubt. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). The standard jury instruction on reasonable doubt used by the trial court was not erroneous.

E. Prosecutorial Misconduct

Alton lastly argues in his supplemental brief that the prosecution improperly bolstered the testimony of Sergeant Wilson by vouching for Wilson's credibility and by commenting on Alton's failure to ask Wilson whether he had been picked out of the lineup. Alton failed to preserve this issue by way of a timely objection at trial. We therefore review this unpreserved claim of prosecutorial misconduct for outcome-determinative plain error. *Carines*, *supra* at 763-764.

After an extensive review of the record, we find that the improper comments by the prosecution, if any, were minor and insignificant. Appellate review of unpreserved claims of

prosecutorial misconduct is precluded if a curative instruction could have eliminated any possible prejudice to the defendant. *People v Duncan*, 402 Mich 1, 16-17; 260 NW2d 58 (1977); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Here, a curative instruction would have been sufficient to cure any prejudicial effect of the prosecutor's comments. Moreover, any possible prejudice was even further lessened by the trial court's instruction that the arguments of counsel do not constitute evidence, *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995), and by the trial court's instruction that the jury should disregard any argument that was not supported by evidence at trial, see *People v Curry*, 175 Mich App 33, 44-45; 437 NW2d 310 (1989). No plain error occurred in this regard.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper